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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Filed Jan. 25, 1900.

No. 1193

D. P. TARPEY, PLAINTIFF IN ERROR,

vs.

ANDREW MADSEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

REPLY BRIEF OF DEFENDANT IN ERROR.

B. H. JONES,
Attorney for Defendant in Error.

(16,961.)

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The defendant in error claims that the land in dispute was excepted and reserved from the grant:

1st. Under Section 3 of the act of July 1, 1862 (12 Stat., 489), by virtue of the settlement of Olney, made prior to the date of definite location, accompanied by a filing as soon as the land office opened.

2d. Under Section 4 of the act of July 2, 1864 (13 Stat., 356), which provided that the grant shall not "defeat or impair any pre-emption claim."

3d. Under Section 4 of the act of July 2, 1864 (13 Stat., 356), which provided that the grant shall not include "the improvements of any bona fide settler."

The Colburn case, 164 U. S. 383, is not in point. In that case it was claimed that the land was excepted from the grant because of the occupation of one Horace F. Kelly on the date of definite location, unaccompanied by a filing, "then or thereafter." The land was surveyed and the survey filed, and the land office was open.

In this case there was occupation and cultivation of Olney *accompanied by a pre-emption filing* as soon as the plot or survey was filed and the land office was opened.

The case of Salt Company *vs.* Tarpey, 142 U. S., 241, is not in point. This case did not decide anything whatever respecting the exceptions in the land grant, "but only that the title to the lands granted took effect, with certain designated exceptions, as of the date of the grant." It never decided anything else.

See Barden *vs.* Northern Pacific R. R. Co., 154 U. S., 315.

The decision of the Utah Supreme Court in this case, Tarpey *vs.* Madsen, 53 Pac., 996, is the only one involving the exceptions and reservations where no survey was approved or filed and where no land office was opened.

Prior to the passage of the act of 1862 nearly all of the valuable lands in Utah and Nevada were occupied.

It was considered that these settlers were protected by Section 3 of the Act of 1862. This provision only granted "public lands not sold, reserved or otherwise disposed of and to which a pre-emption claim may not have attached."

Resolution of Cradlebaugh, of Nevada, 58 Congressional Globe, 1700.

Speech of Cradlebaugh, of Nevada, 59 Congressional Globe, 1949.

Speech of Harlan, 59 Congressional Globe, 2217.

Afterwards, in 1864, to make assurance doubly sure Congress inserted the following new exception and reservation in Section 4:

"Any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land or other lawful claim."

Speaking of this section this court said: "This new provision may make other exceptions while enlarging the grant, and was undoubtedly intended *to add further safeguards to the settler* and further protection to the public."

K. P. R. R. Co., *vs.* Dunmeyer, 113 U. S., 636.

Speaking of this identical section this court said: "Hence we have in the clause of reservation a much more liberal and extended protection of pre-existing rights than in the reservation clause which had become a formula in previous grants.

"Not only are prior reservations made by the government, and rights of pre-emption excepted, but the improvements of bona fide settlers, * * * and any other lawful claim, are unaffected by the grant. Of course this means *any honest claim evidenced by improvements or other acts of possession.*"

Broder *vs.* Water Co., 101 U. S., 277.

In most of the Western States there were no "entered" or "attached" claims. There were no land offices—no surveys.

In this amendatory act of 1864 the word "attached" is eliminated. The idea that it should be an entered claim is abandoned. Had Congress intended to extend its protection only to those whose claims had been entered or "attached" by a filing in the land office this new exception would never have been made. The very purpose of these Pacific Railroad grants was to open up with a view to the rapid settlement of the country vast portions of the public domain unsurveyed and practically unexplored. It was known that a long time would

elapse before land offices would be opened and the public surveys established. "Claim" is the possession of a settler upon wild lands belonging to the government, also the lands themselves so possessed. (3 A. & E. Enc. of L. 273–276, Note 1.)

Bouvier's Law Dictionary, under Claim.

Actual settlement, inhabitation and improvement are essential to a pre-emption right to the ultimate title.

Hosmer *vs.* Wallace, 97 U. S., 575.

Under the pre-emption law, settlement is the first essential; the claimant must afterwards give his notice of intention, inhabit, improve, build his house and make his proof and payment, but in every stage he is protected.

To the railroad company the age status or degree of advancement of the claim is immaterial.

In following the role of guardian and protector of United States lands, the Central Pacific Company in the hundreds and hundreds of contests before the Department of the Interior objects to every degree of advancement of a claim.

In Halling *vs.* Central Pacific before the Interior Department the Company used the lollowing language: "The purpose and intent of Congress in the enactment of the pre-emption and homestead laws, *i. e.*, the making of homes upon the public lands, was totally disregarded."

The defendant in error is attempting to insert or import by construction the word "attached" into this amendatory act of 1864.

In Utah numerous patents have been issued every year from 1869 to the present time, to settlers and cities and towns on odd sections within the forty-mile railroad limits. The decisions of the Department has been followed so long that it has become a rule of property.

If this land was not excepted, then there was no land whatever reserved from the grant, because there was no land office where a filing could be made on October 20, 1868.

All proofs to the Register of the local land office show settlement prior to the date of definite location.

"The patent upon a pre-emption settlement takes effect from the time of the *settlement* as disclosed in the declaratory statement or *proofs* of the settler to the Register of the local land office."

Shepley *vs.* Cowan, 1 Otto, 337.

In view of the fact that the Government declined to issue a patent to the railroad company in 1869, but on the contrary permitted Olney's filing, this case should be treated as though patent had been issued to the settler at that date, and it would take effect from the time of settlement prior to October 20, 1868.

The reasons given by Mr. Julian for the passage of the act

of 1868, opening a land office in Utah, will be found in 80 Congressional Globe, page 2813, Report of Commissioner.

The Register and Receiver held in this case that the land in dispute was reserved and excepted from the grant, because:

"1st. A pre-emption claim had attached to the land in dispute at the time the line of said road was definitely fixed.

"2d. That there was a qualified pre-emption claimant upon the land at that time, which brought it within the first portion of the excepting clause of the act of 1864, which provides that any land granted by this act, or the act to which it is an amendment, shall not defeat or impair any pre-emption claim.

"3d. On the 20th day of October, 1868, the land in dispute contained the improvements of a bona fide settler, which also excepted the land from the provisions of the grant."

I have obtained from the Commissioner of the General Land Office a certified copy of this decision in full, which I ave left with Clerk McKenny for the use of this Court.

The plaintiff in error is responsible for all deficiencies in the bill of exceptions, and it will be most strongly construed against him. This case was tried before the Court and a jury. (Trans., 6.)

As guardian and protector of United States lands, plaintiff in error says that Olney's pre-emption claim was defective.

Under the rules of the Department of the Interior before Olney was permitted to part with his money and make his filing in 1869, a contest was disposed of and the land officers judicially determined that this land was open to Olney's filing.

The defendant in error has not produced this decision. The presumptions are in favor of the action of the Department of the Interior.

Again, the oath required under Section 13 of the pre-emption act of 1841, 5 Stat., 456, is not here. It is presumed that the land officers did their duty. The presumptions are that it corrected everything.

The bill of exceptions is fatally defective.

These ultimate facts fail entirely to show that the land was not within certain exceptions and reservations as shown on page 8 of our first brief.

Corinne Mill, Canal and Stock Co. *vs.* Johnson, 156 U. S., 575.

However, we request the Court to pass upon the important question in the case for the reason that there are numerous cases before the Department of the Interior, and in the State and Federal Courts, with the same question involved awaiting determination.

It is respectfully submitted that the decision of the Supreme Court of Utah should be affirmed.

B. H. JONES,